

Joseph R. Saveri (State Bar No. 130064)
 Steven N. Williams (State Bar No. 175489)
 Cadio Zirpoli (State Bar No. 179108)
 Christopher K.L. Young (State Bar No. 318371)
 Elissa A. Buchanan (State Bar No. 249996)
 Travis Manfredi (State Bar No. 281779)
JOSEPH SAVERI LAW FIRM, LLP
 601 California Street, Suite 1000
 San Francisco, California 94108
 Telephone: (415) 500-6800
 Facsimile: (415) 395-9940
 Email: jsaveri@saverilawfirm.com
 swilliams@saverilawfirm.com
 czirpoli@saverilawfirm.com
 cyoung@saverilawfirm.com
 eabuchanan@saverilawfirm.com
 tmanfredi@saverilawfirm.com

*Counsel for Individual and Representative
 Plaintiffs and the Proposed Class*

**UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION**

J. DOE 1, et al.,
 Individual and Representative Plaintiffs,
 v.
 GITHUB, INC., et al.,
 Defendants.

Case Nos. 4:22-cv-06823-JST
 4:22-cv-07074-JST

**PLAINTIFFS' REPLY IN SUPPORT OF
 MOTION TO MAINTAIN
 CONFIDENTIALITY DESIGNATIONS
 FOR PLAINTIFFS' TRUE NAMES
 PURSUANT TO SECTION 6.3 OF THE
 STIPULATED PROTECTIVE ORDER
 (ECF NO. 63)**

Date: May 4, 2023
 Time: 12:30 p.m.
 Courtroom: 6, 2nd Floor
 Judge: Hon. Jon Tigar

4:22-cv-06823-JST

1 I. INTRODUCTION

2 Defendants Microsoft and GitHub’s opposition to Plaintiffs’ Motion to Maintain
 3 Confidentiality Designations for Plaintiffs’ True Names (ECF No. 75) (the “Opposition”)
 4 discounts Plaintiffs’ real and serious concerns for their physical safety.¹ The GitHub Defendants
 5 minimize the threats Plaintiffs’ counsel have received as mere “trolling.” How this
 6 characterization addresses Plaintiffs’ ability to protect themselves from threats is not explained. If
 7 what Defendants mean is that these threats are benign or not real, that is incorrect. These are not
 8 anonymous participants in online forum jocularly. These are targeted threats. The threats are
 9 personalized and use their real names and their real email addresses. The record shows these
 10 persons have taken the affirmative steps of searching out direct email addresses not publicly
 11 disclosed on filings. This is prima facie evidence of intent and further indicates the possibility that
 12 additional steps will be taken. Plaintiffs themselves have found these threats to their attorneys to
 13 be dangerous and would have serious concern for their safety had their identities not been
 14 protected and they were to receive such threats themselves. Saveri Decl. ¶ 3.

15 Defendants’ claim of prejudice is weak and unsubstantiated. Defendants never answer the
 16 point that Defendants’ counsel have all the information they need to defend this action. Nothing
 17 is preventing the GitHub Defendants from sharing Plaintiffs’ names to their experts subject to the
 18 procedures set forth in the mutually negotiated and stipulated protective order. ECF No. 63. A
 19 lower designation of CONFIDENTIAL would even allow disclosure to employees.

20 Defendants’ assertions regarding Rule 23 class action procedures are similarly misplaced.
 21 First, it is not timely because the suitability of this case to proceed as a class action under Rule 23,
 22 including adequacy of representation and other Rule 23(a) factors, should be decided upon
 23 consideration of a class certification motion, based on a developed factual record. Second, as will
 24 be demonstrated at that juncture, there is nothing about Rule 23 that would prevent proceeding
 25

26 ¹ Plaintiffs note that while the Opposition was filed only on behalf of Defendants and GitHub, the
 27 OpenAI Defendants separately challenge Plaintiffs’ ability to proceed pseudonymously in their
 28 motion to dismiss brief. *See, e.g.*, ECF No. 53 at 6-8 (OpenAI’s Motion to Dismiss).

with pseudonymous plaintiffs. This is another example of the fox guarding the chicken house. *In re Disonics Sec. Litig.*, 599 F. Supp. 447, 451-52 (N.D. Cal. 1984) (“allowing [Defendants] to assist in the determination of whether the representative parties will fairly and adequately protect the interests of the class ‘is a bit like permitting a fox, although with pious countenance, to take charge of the chicken house.’”) (quoting *Eggleston v. Chi. Journeymen Plumbers’ Local 130*, 657 F.2d 890, 895 (7th Cir. 1981)).

II. ARGUMENT

A. Plaintiffs Have Good Cause to Keep Their Names Confidential

Plaintiffs provided three email messages sent to Plaintiffs’ counsel. ECF Nos. 68-1, 68-2, 68-3. These are not mere anonymous threats, two were sent to Plaintiffs’ counsel directly (ECF Nos. 68-1, 68-2)—one of those to a personal email address undisclosed in the pleadings (ECF No. 68-2). The individuals making these threats did not post them on a website. They took affirmative steps to determine the names and email addresses of the attorneys and targeted their threats at them. The senders used their personal email addresses, and one even used their real name, demonstrating the seriousness and credibility of the threats.² Saveri Decl. ¶ 3. Indeed, only one of the messages is clearly from an anonymous sender. ECF No. 68-3. Even if these specific threats were to be categorized as “trolling,” that does not protect them. “Trolling” is serious enough to warrant criminal prosecution. *E.g., United States v. Pillaut*, 783 F.3d 282, 284-85 (5th Cir. 2015) (affirming sentencing of individual who communicated violent threats on the online video game *Runescape*). Plaintiffs found these messages to be threatening and expressed concern for their safety and their families’ safety had the senders known their identities. Saveri Decl. ¶ 3.

Defendants argue these threatening messages do not support Plaintiffs’ reasonable concern for their safety because they were not directed at Plaintiffs. But there is good reason why

² Indeed, the seriousness of Plaintiffs’ fears cannot be understated. Certain Plaintiffs have asked to be allowed to resign as named plaintiffs and remain anonymous rather than allow their names to be shared with the public or even Defendants’ employees. Saveri Decl. ¶ 3.

1 there have been no threats directed at Plaintiffs—their identities have not been disclosed and the
 2 protection afforded by proceeding pseudonymously has been effective.³ Apparently, Defendants
 3 envision a scenario where, rather than addressing the recipient—Mr. Butterick—the sender
 4 merely uses him as a conduit to pass on their threats to his anonymous clients. Mr. Butterick is
 5 merely a proxy for Plaintiffs here, and they reasonably based their desire to proceed under
 6 pseudonyms in part on the messages sent to and directed at him.

7 Taking a swipe at Plaintiffs’ Counsel, Defendants argue that Mr. Butterick’s public
 8 participation in this lawsuit—which was already public before any of these messages were sent—
 9 suggests Plaintiffs’ counsel does not take the threatening messages seriously. Far from it. Indeed,
 10 Plaintiffs’ counsel have taken appropriate steps to report the threats to the authorities, including
 11 reporting it for further investigation with the Federal Bureau of Investigation. Saveri Decl. ¶ 4. In
 12 any event, while it is certainly true that attorneys are subject to certain risks as part of the
 13 profession, *see, e.g.*, Jack Vaughan & Julia Graham, *Risk Management for Law Firms*, 33 No. 12
 14 Legal Mgmt. 6 (2014) (“News headlines provide a constant reminder of the very real and
 15 sometimes deadly threat of violence in the workplace. Law firms and lawyers are in some ways
 16 especially vulnerable to acts of violence by disgruntled clients and unhappy adversaries. Trial
 17 lawyers and divorce attorneys may be the subject of death threats.”), that is no reason that *their*
 18 *clients* should be exposed to the dangers of their counsel’s chosen profession—especially when
 19 those clients are class plaintiffs. The fact that Defendants resent—and want to discourage—the
 20 attention of the public and the press to these significant lawsuits vindicating important rights does
 21 not permit them to enable threats to the plaintiffs, especially when the threats are serious and
 22 actionable and if permitted would discourage assertion of the rights at stake here.

23 Plaintiffs’ fears are especially acute here given that Defendants have acted with laxity
 24 towards materials sealed by this Court in this action already. Defendants blithely ignored that the

26 ³ Plaintiffs have uncovered multiple vulgar comments directed specifically at *them*, i.e., Plaintiffs.
 27 *See* Saveri Decl., Exs. 2–5. Rule 1 of Reddit’s Content Policy prohibits “harassment, bullying, and
 28 threats of violence,” so without discovery, Plaintiffs do not know what other troubling comments
 were made and since deleted. *See* <https://www.redditinc.com/policies/content-policy>.

fact that the threats were directed at Plaintiffs' counsel, Mr. Butterick, was maintained *under seal*. *See, e.g.*, ECF Nos. 68-1 & 68-2 (redacted Exhibits 1 and 2 to the Saveri declaration in support of Plaintiffs' opposition to motion to dismiss filed under seal redacting among other things, Mr. Butterick's name and email address indicating him as the recipient of the threats); *see also* ECF No. 70 (order granting motion to seal Exhibits 1 and 2). Plaintiffs redacted this information for good reason: that redaction would serve the compelling interests of protecting the privacy and safety of the litigants and potential witnesses and would not encourage the threat actors by inflaming their ardor, amongst others. *See* Butterick Decl. ¶¶ 4–7. Indeed, Plaintiffs were careful **not to specify** who received the threatening emails in order not to invite further escalation. *See id.* ¶¶ 7, 10. Notwithstanding the Court's order, the GitHub Defendants revealed Mr. Butterick's identity as the recipient of the threatening messages in the very first sentence of their Opposition, indicating a grave disregard of the Court's Order.⁴ *See, e.g.*, ECF No. 75 at 1 ("Plaintiffs' counsel Matthew Butterick received three nasty emails sent in conjunction with his highly public attempts to solicit plaintiffs for this lawsuit.").

The GitHub Defendants' counsel cannot claim ignorance about how sealing and protective orders work in this district. Judge Alsup has admonished counsel once before for improper cavalier handling of protected material:

The special handling required by protective orders is not mere boilerplate as respondents argue. The special handling is the quid pro quo for gaining access to sensitive information. Those who need to maintain their information in privacy will resist even court orders to allow discovery if the lawyers who want access can brush off the special handling as boilerplate. We must honor our word that the information will be kept secure.

Order Re Protective Order and Motion for Contempt, *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA (N.D. Cal. Sep. 23, 2016), ECF No. 2065 (referring matter to Magistrate Judge to resolve "balance" of motion for contempt); *see also* Transcript of September 22, 2016 Proceedings, *Oracle Am., Inc. v. Google Inc.*, No. C 10-03561 WHA (N.D. Cal. Sep. 27, 2016),

⁴ Plaintiffs are considering the appropriate redress and will promptly meet and confer with the GitHub Defendants in due course.

ECF No. 2068 at 26:2-3 (“THE COURT: A lawyer like [counsel for GitHub Defendants] ought to have known that [counsel] did the wrong thing immediately”). The fact that counsel has once again demonstrated disregard for the Order of the Court and the need for special handling of sensitive information compounds Plaintiffs’ concerns here, especially when credible threats to their physical safety exist.

What is more, Defendants’ position is undercut by their own behavior with respect to Defendants’ own counsel. Defendants took it upon themselves to redact the email address of an Orrick partner⁵ in exhibits to the Hurst Declaration filed with the GitHub Defendants’ reply in support of their motion to dismiss (ECF Nos. 72-2, 72-4). It is puzzling why Defendants would feel the need to redact counsel’s email address contrary to this Court’s rules (*see, e.g.*, Civil Local Rule 79-5) and without explanation.⁶ Indeed, no threats have been issued against counsel or counsel’s safety. This improper and unexplained redaction is particularly remarkable considering Defendants failure to follow this Court’s Order regarding the identity of Mr. Butterick.

B. Defendants Are Not Harmed by the Confidentiality Designation

Defendants assert they require “the assistance of technical personnel” to investigate their claims.⁷ Defendants fail to explain what this means given they have the identities of the Plaintiffs. Likewise, they fail to explain how public disclosure is required to investigate Plaintiffs’ claims.

⁵ Plaintiffs know the identity and will provide it upon request to the Court.

⁶ When Plaintiffs filed messages with redactions (ECF Nos. 68-1, 68-2), they also properly filed a Motion to File Under Seal that included unredacted copies of the same messages (ECF Nos. 65, 65-3, 65-4). Defendants did not follow this procedure and have not provided unredacted copies of ECF Nos. 72-2 or 72-4 to Plaintiffs or the Court.

⁷ Plaintiffs are also concerned what Defendants’ employees might do if they learn Plaintiffs’ true names absent the protections of the Stipulated Protective Order. Saveri Decl. ¶ 5. Microsoft employees have already attacked this lawsuit online anonymously and without revealing their connection to Microsoft. *Id.* ¶ 6 & Ex. 1.

Defendants' bare generalized assertion that input from technical personnel is necessary to investigate Plaintiffs' claims is insufficient to justify disclosure of Plaintiffs' names to the public.⁸

Defendants also claim they must conduct third-party discovery to determine whether Plaintiffs authored and/or own code they have posted publicly on GitHub. But Defendants do not identify what third parties exist that have information bearing on this question nor do they identify what information third parties may have that would require disclosure of Plaintiffs' names to obtain. In any event, should Defendants need to seek information from third parties that requires disclosure of Plaintiffs' names, the Protective Order already provides a mechanism for doing so: a CONFIDENTIAL designation would allow for such disclosures. The vague possibility that such discovery may be necessary is far too unattenuated to justify disclosure in any circumstance, let alone in light of the very real and serious threats of violence here.

C. Absent Class Members Are Not Harmed by the Confidentiality Designation

The GitHub Defendants' only argument regarding the public's interest in disclosure of Plaintiffs' names is that absent class members require Plaintiffs' true names to evaluate their adequacy and whether to remain in the class. They cite several out-of-circuit district court opinions. But none support Defendants' argument that a putative class representative cannot proceed anonymously.

Defendants, relying on *Michael v. Charter Commc'ns, Inc.*, No. 4:17 CV 1242 JMB, 2017 WL 2833404, at *4 (E.D. Mo. June 30, 2017), assert that "Courts have . . . recognized that '[p]laintiff's status as the putative named plaintiff requires that he be the *named* plaintiff.'" Opposition at 5 (emphasis in original). *Michael* does not, however, hold that named plaintiffs must *always* be identified. Rather, the court in *Michael* applied a standard balancing test. *Id.* at *3. Indeed, *none* of the cases Defendants cite require class plaintiffs always to be identified.

⁸ Even if the Court accepts this claim as true, a CONFIDENTIAL designation would be sufficient to allow Defendants' technical personnel to perform their investigations, subject to the terms of the Stipulated Protective Order. ECF No. 64, ¶ 7.2(b).

On the contrary, there is substantial authority for class plaintiffs to proceed anonymously. *See, e.g., Does v. City of Indianapolis, Ind.*, No. 1:06-CV-865-RLY-WTL, 2006 WL 2289187, at *3 (S.D. Ind. Aug. 7, 2006) (“The public interest is not in being able to identify any one Plaintiff, but in being able to follow the case to determine how the constitutional issues are resolved.”); *EW v. N.Y. Blood Ctr.*, 213 F.R.D. 108 (E.D.N.Y. 2003); *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); *E.B. v. Landry*, No. CV 19-862-JWD-SDJ, 2020 WL 5775148, at *6 (M.D. La. Sept. 28, 2020); *Doe v. City of Apple Valley*, No. 20-CV-499 (PJS/DTS), 2020 WL 1061442, at *3 (D. Minn. Mar. 5, 2020) (“Given the stigma and fear of violence previously mentioned, a rule that class representatives must be publicly identified would likely discourage individuals from stepping forward and seeking redress for their injury. That is antithetical to the purpose of the class action.”). Indeed, one of the key principles underlying Rule 23 class actions is the vindication of important public rights. *See Klein v. Dupage Cnty.*, No. 85 C 3430, 1986 WL 13537, at *3 (N.D. Ill. Nov. 19, 1986) (“Class actions are recognized as an important tool for the vindication of legal rights through which a class representative becomes a kind of ‘private attorney general’ for persons who might not otherwise be able to pursue their claims.”) (citing *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 338 (1980)). And class actions in many cases provide the only viable means for large groups of victims of illegal conduct to vindicate their legal rights. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (citing *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). Given the seriousness of the threats at issue, the Court should protect the identities of the plaintiffs in order to permit the principles underlying Rule 23 to be protected and advanced.

Regarding adequacy, Defendants’ counsel—who will certainly investigate and challenge plaintiffs’ adequacy—already have Plaintiffs’ true names. Surely Defendants’ counsel will apprise the Court of any facts they uncover that weigh against a Plaintiff’s adequacy at the proper juncture, i.e., when determining whether a class should be certified. *Landry*, 2020 WL 5775148, at *6 (“[A]ny potential prejudice can be alleviated by the disclosure of Plaintiffs’ full names to both the Court and Defendants. By doing so, the Court will be able to ‘ensur[e] the Plaintiffs are

1 fair representatives of the proposed classes’’) (quoting *City of Apple Valley*, 2020 WL
 2 1061442). To the extent absent class members may challenge Plaintiffs’ adequacy, that is no
 3 impediment to establishing adequacy of representation under Rule 23. *See Does 1-10 v. Univ. of*
 4 *Wash.*, 326 F.R.D. 669,682-83 (W.D. Wash. 2018) (finding anonymous plaintiffs “will fairly and
 5 adequately protect the interests of the class” and granting class certification) (quoting Fed. R. Civ.
 6 P. 24(a)(4)).⁹

7 **III. CONCLUSION**

8 For the reasons stated above, Plaintiffs request their true names retain a confidentiality
 9 designation of HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY. In the alternative,
 10 Plaintiffs request that the Court amend the confidentiality designation of Plaintiffs’ names to
 11 CONFIDENTIAL. In the event the Court removes or alters the confidentiality designation for
 12 Plaintiffs’ names, Plaintiffs respectfully request the Court order that their names retain the
 13 HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY designation until such time as
 14 Plaintiffs file an amended complaint containing the true names of the remaining Plaintiffs.¹⁰

23 ⁹ Plaintiffs here, of course, have every interest in adequately representing absent class members.
 24 In the unlikely event however, that they inadequately represent absent class members, those class
 25 members are free to bring their own claim. *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 853
 26 (9th Cir. 2000) (noting that a final judgment does not have preclusive effect when class
 representatives inadequately represent absent class members).

27 ¹⁰ As noted above, some Plaintiffs will not continue as named Plaintiffs should the Court remove
 28 the confidentiality designation currently protecting their names. At least one would withdraw if
 the designation were reduced to CONFIDENTIAL. *See Saveri Decl.*, ¶ 3.

1 Dated: April 20, 2023

By: /s/ Joseph R. Saveri
Joseph R. Saveri

2
3 Joseph R. Saveri (State Bar No. 130064)
4 Steven N. Williams (State Bar No. 175489)
5 Cadio Zirpoli (State Bar No. 179108)
6 Christopher K.L. Young (State Bar No. 318371)
7 Elissa A. Buchanan (State Bar No. 249996)
8 Travis Manfredi (State Bar No. 281779)

JOSEPH SAVERI LAW FIRM, LLP

601 California Street, Suite 1000

San Francisco, California 94108

Telephone: (415) 500-6800

Facsimile: (415) 395-9940

Email: jsaveri@saverilawfirm.com

swilliams@saverilawfirm.com

czirpoli@saverilawfirm.com

cyoung@saverilawfirm.com

eabuchanan@saverilawfirm.com

tmanfredi@saverilawfirm.com

14 Matthew Butterick (State Bar No. 250953)

15 1920 Hillhurst Avenue, #406

Los Angeles, CA 90027

16 Telephone: (323) 968-2632

17 Facsimile: (415) 395-9940

Email: mb@buttericklaw.com

18 *Counsel for Individual and Representative*
19 *Plaintiffs and the Proposed Class*